SHER TREMONTE LLP

September 8, 2016

The Honorable P. Kevin Castel
United States District Judge
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street
New York, NY 10007

Re: *United States v. Gary Hirst*, 15-cr-643(PKC)

Dear Judge Castel:

On behalf of our client, Gary Hirst, we write to address two outstanding issues in advance of trial. First, we write in opposition to the government's letters of September 6, 2016 and September 7, 2016, which seek to preclude the testimony of Cayman Islands law expert Jan Golaszewski and of the FBI agents who interviewed Mr. Hirst in Los Angeles in 2013. Second, we respectfully request that the Court preclude the government's witness Shant Chalian from testifying concerning matters protected by the attorney-client privilege, or, in the alternative, compel disclosure of Mr. Chalian's prior statements from his prior law firm, Hodgson Russ LLP.

1) Government's Motion to Preclude

The Court should permit the testimony of Cayman Islands law expert Jan Golaszewski and of the FBI agents who interviewed Mr. Hirst in 2013. Mr. Golaszewski will primarily testify as a summary witness, reviewing the governing corporate documents and board minutes (the bulk of which is contained in the government's Rule 16 disclosures, and the remainder of which was turned over to the government by Mr. Hirst) in the context of basic background principles of law. He will not present controversial or obscure points of foreign law or draw conclusions that cannot be drawn from a plain reading of these documents. In these respects, he is similar to the government's witness who will testify regarding SEC filing requirements. The government initially presented that witness as an expert, but then clarified that he will merely present the "fact" of these legal requirements. Mr. Golaszewski will serve a similar function.[1]

A hearing pursuant to Rule 26.1 of the Federal Rules of Criminal Procedure is not necessary. Although the rule provides that the Court should determine questions of foreign law, "it does not necessarily follow" that it precludes "letting the jury decide the

[1] In an abundance of caution, we noticed Mr. Golaszewski as an expert witness and provided disclosure of the opinion he will give. We have today provided the government with a supplemental disclosure on the bases for his testimony.

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question on the basis of expert testimony." *United States v. McClain*, 593 F.2d 658, 670 (5th Cir. 1979). In general, the defense has no objection to the jury hearing testimony from the government's fact witness regarding requirements of the securities laws and determining for itself, based on the instructions given by the Court, whether Mr. Hirst complied with such requirements. Mr. Goleszewski should similarly be able to offer expert testimony on Cayman Islands law, which the jury can credit (or not) in its evaluation of whether Mr. Hirst possessed criminal intent.[2]

With respect to the two FBI witnesses, the fact that Mr. Hirst approached and voluntarily spoke with the FBI, which the government has now confirmed,[3] and provided the agents with a multi-page written document summarizing aspects of Gerova's business demonstrates consciousness of innocence and is therefore highly relevant to the jury's assessment of Mr. Hirst's state of mind. *See United States v. Biaggi*, 909 F.2d 662, 691 (2d Cir. 1990) ("'Let us not deprive an innocent person, falsely accused, of the inference which common sense draws from a consciousness of innocence and its natural manifestations.'" (quoting 2 Wigmore on Evidence § 293, at 232 (J. Chadbourn rev. ed. 1979)). Contrary to the government's argument, Mr. Hirst does not seek to elicit the contents of his statements to the agents, but simply the fact that he voluntarily approached the FBI – before any investigation of Gerova had begun – to offer information regarding his own and others' conduct relating to Gerova. Voluntarily providing such information to law enforcement, knowing that it may lead an investigation of potential wrongdoing by the speaker and others, is a natural manifestation of consciousness of innocence, because no rational guilty person would take such a risk. The Court should permit the introduction of this evidence. The defense is willing to present this evidence by stipulation in order to avoid incurring the time and expense for the two agents to fly to New York to testify.

2) Shant Chalian

The government proposes to call Shant Chalian, a former junior partner at Hodgson Russ LLP, which served as Gerova's SEC counsel. Since the Superseding Indictment alleges that Mr. Hirst hid relevant information from the company's outside lawyers, communications between the company and Hodgson Russ will play an important role in the trial. Given that fact – and the fact that the government's Rule 16 disclosures and Mr. Chalian's 3500 material both contain privileged attorney-client communications – we assumed that the attorney-client privilege had been waived and subpoenaed Hodgson Russ. We have been informed by the law firm and the government, however, that the bankruptcy trustee for Gerova has *not* waived the privilege.[4]

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[2] Should the Court determine that a hearing is needed, we respectfully request that the hearing occur after September 14, 2016, which is the earliest date Mr. Goleszewski can be in New York.

[3] Yesterday, the government wrote to the Court to supplement its letter motion, dated September 6, 2016, stating, "In its letter motion, the government indicated that the agents did not recall whether Hirst or the FBI initiated the interview. While that remains true, the government learned today from prosecutors in California that the interview appears to have been initiated by Mr. Hirst."

Because of the assertion of privilege, defense counsel does not have access to the full universe of Mr. Chalian's prior statements on the matters about which he will testify and will be stymied in cross-examining him if he raises Gerova's privilege in response to questions from the defense. While the government has declined to summarize for the defense the substance of Mr. Chalian's testimony, it appears that he will testify on matters covered by the attorney-client privilege, including communications with the company about SEC filings, disclosure requirements, and activities of the board. This situation is untenable and compromises Mr. Hirst's Sixth Amendment right to confront the witnesses against him. *See Murdoch v. Castro*, 365 F.3d 699, 702 (9th Cir. 2004) (noting that while the Supreme Court has never addressed a case in which the confrontation clause and attorney-client privilege were directly at odds, "[i]ts precedents, however, clearly provide that evidentiary privileges or other state laws must yield if necessary to ensure the level of cross-examination demanded by the Sixth Amendment," and holding that habeas petitioner's Sixth Amendment rights were violated by curtailment of cross-examination based on invocation of attorney-client privilege); *see also United States v. Rainone*, 32 F.3d 1203, 1206 (7th Cir.1994) ("Even the attorney client privilege . . . hallowed as it is, yet not found in the Constitution, might have to yield in a particular case if the right of confrontation . . . would be violated by enforcing the privilege.").[5]

Where a witness attempts to use the privilege as a sword and a shield, the Second Circuit has held, "courts cannot sanction the use of the privilege to prevent effective cross-examination on matters reasonably related to those introduced in direct examination." *United States v. Bilzerian*, 926 F.2d 1285, 1293 (2d Cir. 1991); *see also Applera Corp. v. MJ Research, Inc.* 303 F. Supp. 2d 141, 143 (D. Conn. 2004) (finding that, because defendants had provided "incomplete disclosure of the substance of their communications with counsel or receipt of opinions of counsel . . . testimony related to such advice and opinion . . . will be precluded"). However, unlike a case in which the witness herself may invoke or waive the privilege, and the Court can find an implied waiver, *e.g. Bilzerian*, 926 F.2d at 1293; *Skyline Steel, LLC v. PilePro, LLC*, No. 13-cv-8171 (JMF), 2015 WL 4480725, at *2 (S.D.N.Y. July 22, 2015), here that possibility does not exist because the party testifying does not have authority to waive the privilege. Because the attorney-client privilege "belongs solely to the client," Mr. Chalian "may not waive the privilege without his client's consent." *In re Bank of New York Mellon Corp. Forex Transactions Litig.*, 66 F. Supp. 3d 406, 410 (S.D.N.Y. 2014) (internal quotation marks omitted). As the client, Gerova, has not waived, Mr. Chalian should therefore be precluded from "mak[ing] factual assertions the truth of which can only be assessed by examination of . . . privileged communications" between Mr. Chalian and Gerova principals. *Skyline Steel*, 2015 WL 44080725, at *2; *see also Bowne of N.Y.C., Inc. v. AmBase Corp.*, 150 F.R.D. 465, 475 (S.D.N.Y. 1993).[6] In the alternative, the Court should order Hodgson Russ to disclose Mr. Chalian's prior statements on the matters about which he will testify so that Mr. Hirst can prepare to cross-examine him.

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[4] Because it appeared that we had not received the production given to the government by Hodgson Russ, we requested, and the firm subsequently provided, the documents it disclosed to the government and a privilege log.

[5] While the Second Circuit has noted that it is within the district court's discretion to *limit* cross-examination to the extent it would violate the witness's attorney-client privilege, *see, e.g.*, *United States v. Lin*, 225 F.3d 647, 2000 WL 1340361, at *2 (2d Cir. Sept. 12, 2000) (unpublished table decision), in the context of the privilege against self-incrimination, the Circuit has held that right to confrontation is violated "when assertion of the privilege undermines the defendant's opportunity to test the truth of the witness' direct testimony." *Bagby v. Kuhlman*, 932 F.2d 131, 135 (2d Cir. 1991).

Respectfully submitted,

/s/

Michael Tremonte
Justine A. Harris
Noam Biale

SHER TREMONTE LLP

cc: AUSA Brian R. Blais (by ECF)
AUSA Rebecca Mermelstein (by ECF)
AUSA Aimee Hector (by ECF)

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[6] In the absence of testimony about what his clients told him regarding the Shahini shares and when, the Court should ask the government to proffer what relevant testimony Mr. Chalian has to offer.